Supreme Court, U.S.
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NO. 90-1046

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

TO BE REPRINTED

BARBARA ZAMLEN, et al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF CLEVELAND, ET AL.

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vs.

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BRIEF IN OPPOSITION FOR RESPONDENTS
CITY OF CLEVELAND, ET AL.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether Seventh Amendment rights are abrogated when a district court grants a motion for directed verdict at the close of plaintiffs' case as to a claim of sex discrimination brought under 42 U.S.C. §1983, where plaintiffs' statistical evidence was insufficient to demonstrate intentional discrimination.

2. Whether the appeals court properly applied Wards Cove, when it determined that the defendants in a Title VII case met their burden of producing evidence justifying the use of the selection device.

COUNTER STATEMENT OF THE CASE

On June 1, 1983, this action was filed by Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garuccio, Concetta K. Zingale, Diane Horne and Denise Campbell ("Petitioners"). The action was brought on behalf of the named plaintiffs and the class consisting of all women who took the 1983 entry-level firefighter examination for the City of Cleveland ("City").

Named as defendants were the City of Cleveland; George V. Voinovich, Mayor; Reginald M. Turner, Director of the Department of Public Safety; Thomas Skulina, President of the Civil Service Commission; Edmund J. Turk, Vice President of the Civil Service Commission; Irene M. Morrow, Secretary

of the Civil Service Commission, Nancy Oliver and Solomon Harge, Civil Service Commission members; Karl Schneider, Personnel Administrator for the Civil Service Commission; James J. McNamee, Fire Chief for the City;[1] and Dr. Norman D. Henderson, a psychologist and expert in personnel testing and statistical analyses ("Dr. Henderson"). Dr. Henderson, by contract with the City, developed the 1983 entry-level firefighter examination ("1983 examination"). The individual defendants were sued in both their individual and official capacities.

Plaintiffs' action contained four counts:

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[1]Municipal defendants will be referred to hereinafter as "Respondents."

1. Count One alleged that both the physical and written components of the 1983 examination had an adverse impact on female applicants and were discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. ("Title VII").

2. Count Two alleged violation of 42 U.S.C. §1983 ("§1983") as a result of violations of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

3. Count Three alleged a conspiracy among the defendants, pursuant to 42 U.S.C. §1985(3) ("§1985"), to deprive plaintiffs of their due process and equal protection rights under the Fourteenth Amendment.

4. Count Four alleged that defendants committed fraud by violating Ohio Rev. Code §124.58 and thus defeating, deceiving or obstructing plaintiffs' rights of examination, appointment or employment.

As relief, petitioners sought injunctive relief, backpay, prejudgment

and post-judgment interest, costs, attorneys' fees and such other permanent relief as the district court deemed proper.

An answer was filed on behalf of respondents denying the principal allegations and setting forth affirmative defenses. Principal among the defenses was the position that the 1983 examination was job-related and predictive of job performance. Dr. Henderson filed an answer denying the principal allegations and also asserting as an affirmative defense the fact that the test he administered was job-related.

Subsequently, on December 14, 1983, the United States of America ("United States") commenced Case No. C83-4998 against the City, Civil Service Commission, Cleveland Fire Department, and in their official capacities,

Director Turner, Chief McNamee, Skulina, Turk, Morrow, Oliver and Harge.

Brought under §707 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6(a), the United States' action alleged that the named defendants were responsible for establishing terms, conditions and other practices which bear upon employment of firefighters in the City. The complaint set forth that of the approximately 961 persons employed as firefighters, none was a female. The United States contended that the named defendants pursued policies or practices which discriminate against females and which deprive them of employment opportunities based on their sex. It was further alleged that defendants failed to utilize selection procedures which do not have an adverse impact on females and which are

valid predictors of successful job performance. As relief, the United States sought injunctive relief to halt the alleged discrimination. Respondents filed an answer denying the allegations and raising the same affirmative defenses as in the class action.

The district court denied motions to dismiss which were filed by both the respondents and Dr. Henderson.

In 1983, the City appointed 35 firefighters from the eligible list generated by the 1983 examination. Selection was made on a rank-ordered (top-down) basis. There were no females at the top of the list. On December 21, 1983, the district court granted petitioners' motion for preliminary injunction barring the City from making any further appointments from the eligible list until so ordered by the

court. Approximately one year later, the need arose to appoint additional firefighters. On January 2, 1985, the City filed a Motion for Limited Relief from the Preliminary Injunction. Thereafter, on March 20, 1985, the district court issued the Interim Order Dissolving the Preliminary Injunction. Included in that order were provisions for appointing females as cadets for the next Fire Training Academy class.

On January 30, 1986, the court issued an order certifying the class in this case as all females who unsuccessfully sought firefighter positions from the 1983 examination and all future female applicants. Upon motion of petitioners and the United States, the two cases were consolidated for trial.

Prior to trial, claims against Dr. Henderson were severed from those against the municipal defendants for the purpose of trial. Petitioners also dismissed their §1985 action prior to the start of trial.

Trial of the consolidated cases began on April 6, 1987 before a jury. Testimony was taken for four weeks. Title VII claims were tried to the court while claims under §1983 and the pendent state action were tried to the jury. At the close of the case of petitioners and the United States, respondents moved for directed verdict as to all counts. The district court granted the motion as to the §1983 claim and the pendent state claim for fraud. All individuals named as defendants were likewise dismissed. The trial then proceeded as to the Title VII claims of both the petitioners and

the United States. Closing arguments were held on May 18, 1987.

On May 27, 1988, the district court issued a 69-page Memorandum of Opinion, and Findings of Fact and Conclusion of Law. Appendix, 22A.[2] The court found for respondents. Petitioners filed their notice of appeal to the Sixth Circuit on June 24, 1988. The United States' notice of appeal, filed on July 27, 1988 was dismissed by the appeals court as untimely.

On June 11, 1990, the Sixth Circuit Court of Appeals issued its Opinion affirming the district court's ruling. Petitioners' request for rehearing en banc was denied by the appeals court.

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[2]References to the "Appendix" refer to petitioners' "Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" which has been filed with this Court.

FACTS

Respondents adopt as their statement of the facts the description of the case as outlined in the opinion of the Sixth Circuit Court of Appeals, Appendix 4A-8A.

REASONS FOR DENYING THE WRIT

1. Seventh Amendment rights are not abrogated when a district court grants a motion for directed verdict at the close of plaintiffs' case as to a claim of sex discrimination brought under 42 U.S.C. §1983, where plaintiffs' statistical evidence was insufficient to demonstrate intentional discrimination.

2. The Sixth Circuit Court of Appeals properly applied Wards Cove when it determined that the defendants in a Title VII case met their burden of producing evidence justifying the use of the selection device.

REASONS FOR DENYING THE WRIT

I. Seventh Amendment rights are not abrogated when a district court grants a motion for directed verdict at the close of plaintiffs' case as to a claim of sex discrimination brought under 42 U.S.C. §1983, where plaintiffs' statistical evidence was insufficient to demonstrate intentional discrimination.

Petitioners erroneously apply the holding of Lytle v. Household Manufacturing, Inc., ___ U.S. ___, 110 S.Ct. 1331 (1990) to the appeals court's grant of directed verdict in this case. Petitioners attempt to equate the dismissal in error of claims under 42 U.S.C.A. §1981 in Lytle with the directed verdict granted in this case, since in both cases, the jury was not allowed to decide the legal claims.

The fallacy of this argument is borne out upon examination of the differences in these cases. In

Lytle, the district court erroneously determined "that Title VII provided the exclusive remedy" for employment discrimination injuries. 110 S.Ct. at 1335. The court of appeals affirmed the dismissal, yet noted that claims brought under §1981 and Title VII are separate and distinct. Nonetheless, the appeals court determined that since the district court found against the employee on the Title VII claims, the employee was collaterally estopped from litigating his §1981 claim since the elements of a §1981 cause of action were identical to those under Title VII.

On review, this Court reversed dismissal of the §1981 claims on the ground that equitable claims do not collaterally estop legal claims on the same issue:

> When legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' (Citing to Curtis v. Loether, 415 U.S. 1989, 196, n.11, 94 S.Ct. 1005, 1009, n.11, 39 L.Ed. 2d 260 (1974). 110 S.Ct. at 1335.

Thus, in Lytle, this Court found a violation of the right to trial by jury in "suits at common law" as guaranteed by the Seventh Amendment.

In contrast, the case sub judice does not involve the erroneous dismissal of legal claims on the false assumption that equitable claims preempted the field or collaterally estopped legal claims. Here, the district court, at the close of petitioners' case, granted respondents' motion for directed verdict. Petitioners were granted a jury trial as to claims brought under §1983, yet since the evidence was

insufficient to establish a prima facie claim of discrimination under §1983, a directed verdict was granted.

In noting the strong similarity between the "genuine issue" standard for summary judgment and the "reasonable jury" directed verdict standard, Justice White wrote in Lytle as follows:

> In essence, though, the inquiry under each is the same; whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.
>
> 110 S.Ct. at 251-252

This Court also stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id. at 250. (Citing to Brady v. Southern R. Co., 320 U.S. 476, 479-480 (1943)).

Referring to Milstead v. International Brotherhood of Teamsters, 580 F.2d 232, 235 (6th Cir. 1978), cert. denied 454 U.S. 896 (1981), the Sixth Circuit wrote in Sawchik v. E.I. Dupont Denemours & Co., 783 F.2d 635 (6th Cir. 1989) as follows:

> In considering a motion for directed verdict under Rule 50(a), the trial court "must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury." O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). As applied in this context, "sufficient evidence" is such that, when viewed in the light of those inferences most favorable to the nonmovant, Galloway v. United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 1089, 87 L.Ed. 1458 (1943), and Dowdell v. U.S. Industries, 495 F.2d 641, 643 (6th Cir. 1974), there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ. Sulmeyer v. Coca-Cola Co., 515 F.2d 835, 841 (5th Cir. 1975), cert. denied 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341

(1976), citing 5A Moore's Federal Practice ¶50.02[1] (2d ed. 1974). Appellate courts apply this same standard. O'Neill v. Kiledjian, supra, at 513, citing 9 Wright & Miller, Federal Practice and Procedure §2524, at 542 (1971).

In the instant case, the district court found and the court of appeals agreed that petitioners' statistical evidence was insufficient to demonstrate intentional discrimination under §1983. Directed verdict was therefore appropriately granted. While the Seventh Amendment authorizes trial by jury as to legal claims, it does not insulate a party from the possibility of directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. Petitioners would have this Court make Rule 50(a) a nullity by advancing that the Seventh Amendment requires that in all instances, legal claims should

ultimately be decided by a jury, irrespective of the weight of that evidence.

Petitioners were given several opportunities to offer evidence of intentional discrimination beyond the statistical evidence already presented. Petitioners, along with the United States, sought to "ambush" respondents during the rebuttal phase of the case by their expert testimony. In so doing, they put their §1983 claims at risk by refusing to heed the district court's strong admonitions that they may not survive a directed verdict. Petitioners assumed a known risk and cannot now claim foul.

II. The Sixth Circuit Court of Appeals properly applied Wards Cove when it determined that the defendants in a Title VII case met their burden of producing evidence justifying the use of the selection device.

Petitioners advance that guidance is needed from this Court as to the proper standard to apply in determining whether the defendant in a disparate impact case has met its burden of producing evidence of job-relatedness. Petitioners further ask this Court's guidance as to when that evidence has been rebutted.

This Court provided a definitive blueprint on burden of proof in a Title VII action when it decided Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). The instant case presents no issue that should compel this Court to revisit burden of proof.

Petitioners correctly state that Wards Cove was decided while this case

was on appeal. When the Sixth Circuit ultimately ruled, though, it had the benefit of this Court's guidance in Wards Cove.[3] The appeals court properly determined that respondents' burden was one of only producing evidence to justify the selection device. Based on the status of the law at the time of trial, the district court had determined that after the plaintiff proved disparate impact, the burden of proof shifted "to the defendant to demonstrate that the selection device is required by business necessity." District court opinion, Appendix at page 56A.

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[3]In footnote 8 of their brief, petitioners erroneously stated that the Sixth Circuit indicated that the doctrine announced in Spurlock v. United Airline, Inc., 475 F.2d 216 (10th Cir. 1972) was no longer applicable. The appeals court merely stated that in light of Wards Cove, it "need not decide whether the Spurlock doctrine was properly invoked." See Appendix at page 16A.

The appeals court noted that in applying Spurlock and related cases, respondents' burden had been greater than that now required under Wards Cove. Consequently, having met the more onerous burden of pre-Wards Cove case law, respondents more than adequately met the Wards Cove standard. Even before Wards Cove, the law was established that the ultimate burden of persuading the trier of fact in a Title VII action rests at all times with the plaintiff. Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Contrary to petitioners' view, respondents' evidence on the validity and job-relatedness of the 1983 firefighter examination was not conclusively or even remotely rebutted

by petitioners. The appeals court noted that there was substantial evidence before the district court supporting the conclusion that the examination was properly validated. In response to that substantial body of evidence, petitioners merely offered testimony of alternative scoring methods, none of which would have resulted in the hiring of females or a reduction in adverse impact. Petitioners were unable to rebut the strong evidence of validity by offering a selection methodology with equal or similar utility and less adverse impact.

Finally, in a last desperate attempt to secure review by this Court, petitioners attempt to link the existence of the appeals court ruling with aspirations of women to become firefighters. Citing to Berkman v. City

of New York, 812 F.2d 52 (2d Cir.), cert. denied, 108 S.Ct. 146 (1987), petitioners strongly imply that the Sixth Circuit's ruling will forever bar women from the ranks of firefighters. Such is not the case.

As one of respondents' expert testified, it is the job of firefighting that discriminates, not the test. Dr. Theus Doolittle, an exercise physiologist, testified that because firefighting is labor intensive, it will always exclude from its ranks those who are smaller and weaker. Size and morphology, and not sex are the deciding factors. Females, as well as males, who possess the physical and intellectual skills to perform the job of firefighter will be able to secure that position.

Thus, Dr. Henderson's test, which was validated on all three bases

identified in the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection, 29 C.F.R. §1607 (content, construct and criterion-related validity), did not unlawfully trammel the aspirations of women seeking the job of firefighter. Nor will the appeals court's ruling, which appropriately upheld the district court's ruling.

Taken as a whole, petitioners offer no new arguments, nor raise any compelling federal constitutional or statutory issue to warrant granting their writ of certiorari.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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